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No. 372

In the District Court of Appeal

SECOND APPELLATE DISTRICT

DIVISION TWO

State of California

SOUTH COAST [illegible], INC., a California Corporation,
Plaintiff and Appellant,

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Respondent.

STAR-KIST FOODS, INC., a California corporation, FRANCO ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, and MARINE CURING AND PACKING CO., a California corporation,
Plaintiffs and Appellants,

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Respondent.

2nd CIVIL NO. 25773

SUPERIOR COURT
No. [illegible]
COUNTY

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Plaintiffs and Appellants,

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DEPARTMENT OF FISH AND GAME,
Defendant and Respondent.

2nd CIVIL NO. 26173

SUPERIOR COURT

Nos. LB C-26514

C-26970

Consolidated

APPEAL FROM DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA TO THE SUPREME COURT OF THE UNITED STATES.

JURISDICTIONAL STATEMENT AS REQUIRED BY RULE 13 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States appellant's file, this, their statement particularly disclosing the basis on which appellant's contend that the Supreme Court

of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

I

The only reported opinion in the instant case appears at 213 A.C.A. 351, 28 Cal. Rptr. 537, a copy of which opinion is appended hereto, marked Exhibit A.

II

This is an action for recovery of taxes paid under an allegedly invalid statute in violation of Article I, Section 10, Clause 2, of the United States Constitution.

III

1. The opinion affirming judgment sought to be reviewed was filed by the District Court of Appeal, Second Appellate District, State of California, Division Two on February 21, 1963. On April 17, 1963, the Supreme Court of the State of California filed an order denying appellants' petition for hearing in said Supreme Court.

2. The Notice of Appeal was filed with the clerk of the District Court of Appeal, Second Appellate District, State of California on May 10, 1963. On June 17, 1963 an amended praecipe was filed with said clerk. By order of the District Court of Appeal, Second District, State of California, the time for docketing the appeal in the instant case was enlarged to and including August 15, 1963, a copy of which order is appended hereto, included in Exhibit B.

IV

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of

this appeal is Section 1257 (2) of Title 28 of the United States Code which provides that:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question, the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

V

The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

Central Railway Company of Pennsylvania v. Commonwealth of Pennsylvania, 370 U. S. 607, 82 S. Ct. 1297, 8 L.Ed.2d 720.

Storaasli v. State of Minnesota, 283 U. S. 57, 51 S. Ct. 824, 75 L.Ed. 839.

VI

The statute of the state the validity of which is involved is Division 6, Part 3, Chapter 1, Article 7, Section 8045 and 8047 (formerly 1015 and 1017), of the California Fish and Game Code which provides as follows:

8045. Privilege Tax; Rate

Every person operating under a license pursuant to this article shall, in addition to the license fee, pay the following privilege tax:

(a) Five cents ($0.05) for each hundred pounds, or fraction thereof, of fish other than salmon, purchased, received or taken by him.

(b) In the case of a person who receives salmon from fishermen, one-half cent ($0.005) per pound based on the weight of salmon in the round.

Fish so taken or received, other than salmon, mollusks, and crustaceans, which are utilized for human consumption in a fresh state shall not be subject to tax.

8047. Privilege Tax; Time for Payment; Penalty

Privilege taxes imposed by this Article shall be paid monthly to the department within 30 days after the close of each month.

If any tax is not paid within 60 days after the close of the month for which it is due, a penalty equal to 10 per cent of the tax shall be added to it.

VII

The questions presented by this appeal are as follows:

A. Does a tax levied by a state, in addition to a license fee, upon fish canners licensed by the state, on fish purchased, received or taken, violate Article I, Section 10, Clause 2 of the Constitution of the United States when said tax is levied upon fish imported from foreign sources?

B. Does the fact that the importer intends to use such imported fish for its own manufacturing needs, rather than for direct resale in fresh condition remove any tax upon such imported fish from the prohibition

of Article I, Section 10, Clause 2, of the Constitution of the United States?

C. Does the re-icing and refrigeration or other acts done merely to retard spoilage of a perishable imported product justify a holding that the imported product has been so acted upon as to lose its distinctive character as an import?

VIII

The facts material to a consideration of the questions presented are as follows:

Each of the appellants was engaged in the business of processing and canning fresh and frozen fish and marketing the canned products. During the period involved in this litigation each of the appellants was licensed as a fish canner and processor by the Department of Fish and Game of the State of California

At various times during the years 1953, 1954, 1955, 1956, 1957 and 1958, appellants purchased upon ocean bills of lading from Japan, yellowfin, bigeye and shipjack tuna fish and albacore. The fish imported from Japan were landed in a frozen condition from ocean going vessels at the Port of Los Angeles. Although some of this fish was received in its natural state, ("in the round"), most of it had had the gills and the entrails removed in Japan prior to shipping ("gilled and gutted").

While aboard the ships enroute from Japan to the Port of Los Angeles, the fish were kept frozen in refrigerated holds, and were generally stacked individually. Occasionally, these loose fish were wrapped in plastic or burlap, either individually or in groups of three and four.

After the fish arrive at dockside, longshoremen unload them from the hold by placing them in buckets or slings which are lifted to the dock by the ship's booms. At this point the fish are inspected and entered by the United States Department of Agriculture and are then immediately placed in rail cars spotted near the dock. This unloading operation is carried on under the supervision and control of an independent contractor pursuant to contracts with the appellants. The rail cars are then iced and are delivered to appellants' plants when needed and called for. The fish may be called for immediately, or left in the rail cars for periods up to twelve days before being called for. The amount of ice used varies with the weather and the length of time the fish will remain in the cars.

When called for the rail cars are brought to and parked on spur tracks, on appellants' properties, and are then unloaded by appellants' employees. After removal from the rail cars, the fish are transported to nearby public scales which may or may not be on properties of appellants.

After being weighed, the fish are immediately transported to rooms inside appellants' plants and deposited there to thaw along with domestic frozen fish.

Pursuant to the Fish and Game Code, appellants submitted monthly reports and paid taxes based on the total weight of frozen fish received at the plants as determined by the weighing process at the public scales. These amounts so reported, included domestic fish as well as imported.

Some fish imported from Japan were sold to others while still in rail cars and were not reported as it was

never received or weighed at the plant of the appellant who sold it.

Appellants filed suit for recovery of the taxes illegally paid in the Superior Court in and for the County of Los Angeles, State of California. Two actions were filed, one on behalf of appellant South Coast Fisheries, Inc., and the other on behalf of the other appellants. Both actions were later consolidated. The complaints in both actions alleged that the tax imposed "on account of purchase and receipt of said imported fish is illegal, unconstitutional and void, being in contravention of Article I, Section 10, Clause 2 of the Constitution of the United States, which provides:

> " 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; and the net Produce of all Duties and Imposts, laid by any state on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll (sic) of the Congress.'
>
> "The Congress of the United States has not given its consent to the imposition of the purported privilege tax prescribed by Section 8045 upon the said imported frozen fish, and the said tax is not absolutely necessary, or necessary at all, for the execution of any inspection statute of California."

Appellee in both actions denied the unconstitutionality of the tax and raised several affirmative defenses which were never passed upon by the trial or appellate

courts, because the finding on the constitutional issue made it unnecessary. It should be noted, however, that even if the non-constitutional issues regarding appellee's affirmative defenses had been decided adversely to appellants', they would only have affected part of appellants' claims and the constitutional question would still be in issue as to the remainder.

Thus, at the very inception of the lawsuit, the validity of Sections 8045 and 8047 of the Fish and Game Code of the State of California was drawn in question on the ground that in its application to imported fish, it was repugnant to the Constitution of the United States.

In both the Superior Court and the District Court of Appeal, the only issue reached was the Constitutional one and in both courts, it was decided in favor of the validity of the State statute.

The Findings of Fact and Conclusions of Law of Judge Francis which are included in Appendix B, together with a Stipulation of Facts, Memorandum Decision, and Judgment in this case, demonstrate how far reaching is the decision in this case, and the enormous consequences it will have if allowed to stand.

Judge Francis states in his Conclusions of Law:

> "1. The taxes involved in these consolidated cases were lawfully imposed and collected for the following reasons and each of them.
>
> (a) Section 8045 of the California Fish and Game Code provides for an excise tax upon the privilege of engaging in the local business activity of processing and canning fish, the measure of which is determined by the poundage of fish con-

sumed, rather than a tax upon the fish or their receipt.

(b) At the time the taxes involved herein were imposed, the fish, the poundage of which formed the measure of said taxes, had been used for the purpose for which they were received and thus had become subject to state taxation.

(c) At the time the taxes involved herein were imposed, the fish, the poundage of which formed the measure of said taxes, had lost their distinctive character as imports and thus were subject to state taxation.

"2. That for the foregoing reasons and for each of them, the original package doctrine is not applicable in these cases and the taxes imposed by the defendant did not violate Article I, Section 10, Clause 2, the Import-Export clause, of the Federal Constitution.

"3. That the foregoing conclusions make it unnecessary to consider defendant's further contentions regarding sovereign immunity, voluntary payment and the statute of limitations."

The District Court of Appeal in affirming Judge Francis' decision stated:

"Remembering that we are concerned here solely with the imposition of the tax upon appellants' canning and processing business, it appears inescapable that a privilege tax measured by gross product consumed is a valid exercise of the state's taxing power. The fact that some portion of the material used in such enterprises might originally have been exempt from taxation

is not decisive. Even if it were a fact that the raw materials were measured prior to the commencement of the processing thereof, and hence at that time maintained their original exempt character, such fact would be immaterial absent any allegation that such material was not actually consumed thereafter in appellants' processing and canning businesses." (Opinion of the District Court of Appeal, Appendix A)

The Court goes on to say:

"Since the tax considered by the United States Supreme Court in Youngstown and U. S. Plywood cases, supra, was an ad valorem property tax upon the imported property itself, and such property apparently had been stored for considerable periods of time pending use, it seems clear that a tax upon a process and canning business may be validly levied, and the amount thereof computed by measuring the materials that are received at the processing plants and which, due to their very nature, are immediately put to the very use for which they were imported.

"The stipulated facts might also be held to justify the trial court's holding that the fish had been so acted upon following their receipt as to lose their distinctive character as imports. (Citations) In view of our foregoing analysis, however, we do not deem it necessary now to decide this question." (Opinion of the District Court of Appeal, Appendix A).

If the judgment in the instant case is allowed to stand, the Import-Export Clause of the United States Constitution would be nullified. A state could avoid

the prohibitions of the clause by merely denoting the tax as a privilege, excise or franchise tax, which is merely measured by the imported goods. It is impossible to think of a situation in which a tax on imports could not be thus legally imposed. The courts in the instant case have ignored the clear language of Section 8045 of the Fish and Game Code to do just that. The tax is denominated by the statute as "(a) Five Cents ($0.05) for each hundred pounds, or fraction thereof, of fish, other than salmon, purchased, received or taken by him."

The District Court of Appeal in holding that this is a privilege tax on packing and processing and not on purchasing, receiving or taking fish states:

> "This is made clear by the fact that it is applied to those persons who already have obtained licenses to engage in the specified businesses and Section 8045 specifically provides that it is not applicable to fish 'which are utilized for human consumption in a fresh state.'" (Opinion of the District Court of Appeal, Appendix A)

The District Court of Appeal in interpreting the statute completely ignores the fact that salmon, mollusks and crustaceans, utilized for human consumption in a fresh state are subject to the tax. It also ignores the fact that the statute speaks in terms of the fish being subject to the tax; not in terms of the tax not being measured by fish utilized in a fresh state. Also, the statute speaks only in terms of human consumption being exempt. Apparently fresh fish utilized for pet food would be taxed.

The Conclusions of Law and the opinion in this case have effectively killed the Original Package Doctrine

with regard to goods imported by a manufacturer for his own use. If the decision is allowed to stand any goods which a manufacturer intends to use himself could be directly taxed at the dock even though in their original crates, for they would be "committed to use." The District Court of Appeal also ignores the specific purpose for which the statute was enacted as shown by the legislative history of Section 8045. This Section originated in the California State Senate as Bill Number 767, and was added as Chapter 687 of the Statutes of California for the year 1917 at page 1275. The purpose of the Act is therein stated as "an act to license canners, curers, preservers and packers of fish . . . and providing a revenue therefrom for the conservation, propagation and restoration of fish in the State of California. . ."

At the time this bill was passed, the process of quick freezing was not known. It was assumed that all fish brought to California canneries were California fish, caught in California waters. The commercial canneries, it was feared, would put such a heavy demand on local waters that revenue had to be raised to prevent the extinction of local fish. It was decided to place a tax on the fish so removed, in order to raise revenue to replace them in the California waters from which it was assumed they were removed. Thus it is quite clear that this is a revenue tax directly on the fish and not truly a tax on the privilege of canning. This tax was never intended to be applied to foreign fish at any stage for there is no need to replace fish in the waters of California to compensate for fish taken in the waters of Japan.

The exclusion of fish utilized in a fresh state for

human consumption was made because the drain in this regard was minimal, except for salmon, mollusks and crustaceans, which were being taken in great quantities for this purpose.

When considered in this light, Section 8045 as enforced by the State of California is obviously a direct tax on foreign fish in order to build up and protect the California fishing industry and as such is clearly unconstitutional. It makes the intent of the importer the criterion for tax ability rather than considering the question of whether or not the importation has ended. It is obvious that these goods were taxed by the state at the very first opportunity — upon receipt, as soon as they were weighed, so that the tax could be computed. The receipt that the Court was thinking of was receipt at the dock and not receipt at the plant. This is borne out by the fact that the Court when speaking in regard to loss of distinctive character as an import on page 11 of the Opinion said ". . . . the fish had been so acted upon following their *receipt* (emphasis ours) as to lose their distinctive character as imports."

The receipt of which the Court speaks had to be receipt at the dock for it was after receipt at the dock and before receipt at the plant that the fish were iced, for it was only between the receipt at dockside and the act of weighing that anything could have been done to the fish so as to change their character.

Although the District Court of Appeal stated that it was not deciding the question of loss of distinctive character as an import, in effect it did. The District Court of Appeal indicated that the fact of icing a perishable product all by itself could be held to be

such action as to cause the product to lose its status as an import. If the case is remanded to the District Court of Appeal, the court has indicated by such dicta that it would sustain the tax on this ground. If this is permitted, no perishable product could ever at any stage after reaching a taxing jurisdiction of any of the United States, be considered an import.

The issues in the instant case are among the most important ever to be decided with respect to the Import-Export clause. If the judgments are affirmed, the prohibitions of the United States Constitution in reference to imports, are completely destroyed. These prohibitions then become merely a mandate to the state that a tax upon imports by any other name is not a tax upon imports. If the judgments are affirmed, the only question left to be decided are "Did the state actually call it a tax on imports?" and "What use is planned for the imported product?"

It is respectfully submitted that a decision which forebodes the virtual nullification of a Clause of the United States Constitution should be subjected to the utmost scrutiny and full and searching argument before the Honorable Justices of this Court.

Respectfully Submitted

REAL and REAL
by John J. Real
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APPENDIX A

In the District Court of Appeal

SECOND APELLATE DISTRICT
DIVISION TWO

State of California

Civil No. 26173
Dist. Court of Appeal
Second District

FILED

FEBRUARY 21, 1963

SOUTH COAST FISHERIES, INC., a California corporation, STAR-KIST, INC., a California corporation, FRANCO-ITALIAN PACKING CO., a California corporation,

Plaintiff and Appellants,

vs.

DEPARTMENT OF FISH AND GAME,

Defendant and Respondent.

Real & Real, M. L. Real, San Pedro, for Appellants.

Stanley Mosk, Atty. Gen., Dan Kaufmann, Asst. Atty. Gen., Neal J. Gobar, Deputy Atty. Gen., for Respondent.

HERNDON, Justice.

This appeal is taken by the several plaintiffs in two

consolidated cases wherein judgment was rendered in favor of defendant following a nonjury trial. By their actions appellants seek a refund of moneys paid to the state over a period of several years under the license and tax provisions of division 6, part 3, chapter 1, article 7 of the California Fish and Game Code. The sole issue presented by this appeal is the correctness of the trial court's ruling upholding the constitutionality of said article 7, and, particularly, sections 8045 and 8547 thereof.

Pertinent sections of said article of the Fish and Game Code provide, in applicable part, as follows: Section 8040(a) requires every person engaged in canning, curing, preserving, packing or dealing at wholesale in fish taken from the waters of this state or brought into this state in a fresh condition to obtain a license. Section 8041 authorizes the licensees to carry on their businesses subject to the provisions of said code for a period of one year. Section 8042(a) sets the annual fee for the licenses here involved (i.e., fish canners and processors) at $75.00. Section 8043 requires that certain specified records be kept. Section 8045 provides:

"Every person operating under a license issued pursuant to this article shall, in addition to the license fee, pay the following privilege tax: (a) Five cents ($0.05) for each hundred pounds, or fraction thereof, of fish other than salmon, purchased, received or taken by him. (b) In the case of a person who receives salmon from fishermen one-half cent ($0.005) per pound based on the weight of the salmon in the round. Fish so taken or received other than salmon, mollusks, and crustaceans, which are utilized for human con-

sumption in a fresh state shall not be subject to the tax."

Section 8046 relates to an additional privilege tax on certain types of fish and is not involved in the present proceeding. Section 8047 requires that the privilege taxes imposed by said article "shall be paid monthly to the department within 30 days after the close of each month. If any tax is not paid within 60 days after the close of the month for which it is due, a penalty equal to 10 per cent of the tax shall be added to it." Sections 8048 to 8052 relate to the enforcement of said tax provisions and sections 8055 and 8056, respectively, concern the limitations, and the expenditure of moneys collected pursuant to this article.

By a "Stipulation of Facts" the parties agreed that during all relevant periods, appellants were engaged in the business of processing and canning fresh and frozen fish and marketing the canned product. They were operating under licenses issued in accordance with the above cited article of the Fish and Game Code. During the years involved, appellants purchased frozen fish from both Japanese and domestic sources. The fish purchased from Japanese sources were landed in a frozen condition from ocean-going vessels at Los Angeles harbor. Although some of this product was received in its natural state ("in the round"), most of it had been "gilled and gutted;" that is to say, the gills and the entrails had been removed prior to shipping. While aboard the ships en route to Los Angeles, the fish were carried in refrigerated holds and generally were stacked individually, like a cord of wood. On occasion, these loose fish were wrapped in plastic or burlap, either individually or as packages of

three or four. Upon arrival at the port, the fish were unloaded, inspected by the United States Department of Agriculture, and then immediately placed in railroad cars spotted near the dock. These operations were handled by independent contractors. After being loaded in the railroad cars, these fish generally were "iced;" that is, ice was inserted in the cars, and then delivered within one to twelve days to appellants' processing plants when needed and called for. Thus, if the fish were needed at once, they might be taken to appellant's facilities without any "icing," but if not so required, various amounts of ice were placed in the cars dependent upon the estimated number of days that would elapse before they would be needed, and, of course, upon weather conditions.

When delivered at appellants' facilities, the cars were placed upon spur tracks and unloaded by appellants' employees. The fish were then placed upon movable carts or conveyers and transported to nearby public scales for weighing by a "Certified Public Weightmaster." After being weighed, the fish were immediately transported to "fish rooms" within appellants' plants and deposited there to thaw along with other frozen fish. When thawed, they were "gutted," otherwise prepared and canned. The same basic procedures were followed in processing fish received from domestic sources.

In accordance with the provisions of the Fish and Game Code, appellants filed monthly "Tax Reports" wherein the amounts, in pounds, as determined by the weighing system described above, were set forth for all fish actually processed without distinguishing their sources, whether foreign or domestic. Some of the fish

purchased from Japanese sources were sold "as is" to others and thus were not received at, or processed through, appellants' plants. These fish were not reported by appellants and form no part of the measure of the tax involved herein.

Appellants contend that the tax as applied to imported fish is unconstitutional and void by reason of its being in contravention of articles I, section 10, clause 2 of the United States Constitution which provides: "No State shall, without the Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." Basically stated, it is appellants' contention that the tax in question is illegal because it is a disguised tax upon the fish imported before they have lost their character as "imports" under the "original package" doctrine enunciated in Brown v. Maryland, 12 Wheaton (U. S.) 419, 6 L.Ed. 678.

Upon the stipulated facts, the trial court concluded as follows: (1) that section 8045 of the Fish and Game Code provides for an excise tax upon the privilege of engaging in the local business activity of processing and canning fish, the measure of which is determined by the poundage of fish consumed in such business activity, rather than a tax upon the fish or their receipt; (2) that at the time the tax here involved was imposed, the fish had been received and committed to supply, and were essential to the current

operating needs of appellants in their canning operations; and (3) that at the time the tax was imposed, the fish had been handled and processed to such an extent that they no longer were either in their original form or in the same condition as they were when they arrived at the port of Los Angeles.

[1, 2] "It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents and from the natural and legal effect of the language employed in the statute." (Ingels v. Riley, 5 Cal.2d 154, 159, 53 P.2d 939, 942, 103 A.L.R. 1.) Where a statute is subject to more than one construction, it is the duty of the courts to give it that construction which will harmonize it with all state and federal constitutional restrictions. (City of Los Angeles v. Belridge Oil Co., 48 Cal.2d 320, 324, 309 P.2d 417; Bodinson Mfg. Co. v. California E. Com., 17 Cal.2d 321, 326-327, 109 P.2d 935.) Finally, one who challenges the constitutional validity of a statute must show that a violation of a constitutionally protected right has occurred in the very factual situation presented to the court. (Wholesale T. Dealers v. National, etc. Co., 11 Cal.2d 634, 661, 82 P.2d 3, 118 A.L.R. 486 and Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177.)

The tax here before us is denominated by the Legislature as a "privilege tax," and it is imposed upon those who would conduct the business activity of packing and processing fish in California. This is made clear by the fact that it is applied to those persons who already have obtained licenses to engage in the speci-

fied businesses and section 8045 specifically provides that it is not applicable to fish "which are utilized for human consumption in a fresh state."

Appellants actually do not appear to dispute the fact that the tax here involved is a *privilege* tax; rather they base their arguments upon the premise that such a tax cannot be applied if measured by the quantity of raw materials used in their business where such materials are in part composed of imports that remain, *per se*, free from taxation at the moment of measurement. They appear thus to confuse the *nature* of the tax with the mode adopted for ascertaining its *amount*.

[3] As our California Supreme Court stated in dealing with an analogous situation in Ingels v. Riley, supra, page 160, of 5 Cal.2d page 942 of 53 P.2d: "We are of the opinion that, if a tax in its nature is a privilege tax, it does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed. [Citations.] * * * 'The character of the imposition is not determined by the mode adopted in fixing its amount.' "

The United States Supreme Court in Flint v. Stone Tracy Co., 220 U. S. 107, 31 S.Ct. 342, 55 L.Ed. 389 passed upon a similar contention made in regard to a corporation excise tax computed upon the entire net income of the company from all sources, where a portion of such income was derived from interest on bonds that were exempt from taxation. In rejecting this contention, the court interpreted the tax as being not imposed directly upon tax exempt property, but as an *excise* upon the privilege of engaging in business,

indirectly *measured* by reference to property or income therefrom. The court stated at page 162, 31 S.Ct. at page 353: "But this argument confuses the measure of the tax upon the privilege with direct taxation of the state or thing taxed * * *" And at pages 163-164, 31 S.Ct. at page 354: "* * * where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself nontaxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

Similarly, in Canton R. Co. v. Rogan, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488, a state franchise tax upon a railroad was challenged because it was measured by gross receipts, a portion of which were derived from moving import and export freight to and from the harbor. It was held that such tax did not violate the import-export clause of the United States Constitution, because it was not a tax upon the *articles* of import and export, but rather upon the *business* of handling these articles.

[4, 5] Remembering that we are concerned here solely with the imposition of the tax upon appellants' canning and processing businesses, it appears inescapable that a *privilege* tax measured by gross product consumed is a valid exercise of the state's taxing power. The fact that some portion of the material used in such enterprises might originally have been exempt from direct taxation is not decisive. Even if it were a fact that the raw materials were *measured* prior to

the commencement of the processing thereof, and hence at that time maintained their original exempt character, such fact would be immaterial absent any allegation that such material was not actually consumed thereafter in appellants' processing and canning businesses.

Secondly, it is apparent that whatever may be the true and ultimate interpretation of the "original package" doctrine, the United States Supreme Court in the consolidated cases of Youngstown Sheet & Tube Co. v. Bowers and United States Plywood Corp. v. City of Algoma, 358 U. S. 534, 79 S.Ct. 383, 3 L.Ed.2d 490, has made it clear that goods imported by manufacturers for use in their manufacturing processes lose their tax exempt status as "imports" when they have been committed to, and are essential to, their current operational needs. The court there stated, at page 549-550, 79 S.Ct. at page 392:

"The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They

were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers."

[6] Since the tax considered by the United States Supreme Court in Youngstown and U. S. Plywood cases, supra, was an *ad valorem* property tax upon the imported property itself, and such property apparently had been stored for considerable periods of time pending use, it seems clear that a tax upon a processing and canning business may be validly levied, and the amount thereof computed by measuring the materials that are received at the processing plants and which, due to their very nature, are immediately put to the very use for which they were imported.

The stipulated facts might also be held to justify the trial court's holding that the fish had been so acted upon following their receipt as to lose their distinctive character as imports. (Gulf Fisheries Co. v. MacInerney, 276 U. S. 124, 48 S.Ct. 227, 72 L.Ed. 495; E. J. Stanton & Sons v. County of Los Angeles, 78 Cal.App.2d 181, 177 P.2d 804, hearing by the California Supreme Court denied and certiorari denied, 332 U. S.: 766, 68 S.Ct. 75, 92 L.Ed. 352.) In view of our foregoing analysis, however, we do not deem it necessary now to decide this question.

The judgments are affirmed. The purported appeals from the orders denying motions for new trial are dismissed.

FOX, P. J., and ASHBURN, J., concur.

APPENDIX B

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DAN KAUFMANN, Assistant Attorney General
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Attorneys for Defendant

FILED
January 24, 1961

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. LB C 26970

STAR-KIST FOODS, INC., a California corporation, FRANCO-ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, PAN PACIFIC FISHERIES, INC., a California corporation and CALIFORNIA MARINE CURING AND PACKING CO., a California corporation,

Plaintiffs,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

No. LB C 26514

SOUTH COAST FISHERIES, INC., a California corporation,

Plaintiff,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective attorneys of record, that the following facts are true and that no evidence need be introduced in support thereof, without prejudice to the right of said parties to object to the materiality or relevancy of these facts:

I

Each of the plaintiffs is and at all times mentioned herein was a California corporation with its principal place of business located in the County of Los Angeles, State of California.

II

At all times mentioned herein each of the plaintiffs was engaged in the business of processing and canning fresh and frozen fish and marketing the canned product. During the period involved in the within litigation, each of the plaintiffs was licensed as a fish canner and processor by the Department of Fish and Game, pursuant to Division 6, Part 3, Chapter 1, Article 7 (Section 8040 et seq.) of the California Fish and Game Code.

III

The business of the plaintiffs, insofar as pertinent to the within litigation, was conducted as follows:

a) At various times during the years 1953, 1954, 1955, 1956, 1957 and 1958, plaintiffs purchased upon ocean bills of lading from Japan yellowfin, bigeye, skipjack tuna fish and albacore. During this period plaintiffs also purchased frozen tuna fish and albacore from domestic sources.

b) The fish purchased from Japanese sources as

aforesaid were landed in a frozen condition from oceangoing vessels at the Port of Los Angeles. Although some of this fish was received in its natural state ("in the round"), most of it had been "gilled and gutted," i.e., the gills and the entrails had been removed prior to shipping.

c) While aboard the ships en route to the Port of Los Angeles, the fish were carried in refrigerated holds and were generally stacked individually, like a cord of wood or logs. On occasion, these loose fish were wrapped in plastic or burlap, either individually or in groups of three or four.

d) After the ships arrive at dockside, longshoremen unload the fish from the hold by the process of placing them in buckets or slings which are lifted to the dock by the ship's booms. At this point the fish are inspected and entered by the United States Department of Agriculture and are then immediately placed in rail cars spotted near the dock. This unloading operation is carried on under the supervision and control of an independent contractor pursuant to contracts with the plaintiffs.

e) Once the fish are loaded in rail cars they are generally "iced" (i.e., ice is inserted in the cars), and are immediately delivered (within one to twelve days) to plaintiffs' plants by the Los Angeles Harbor & Belt Line Railroad, a common carrier, pursuant to instructions from plaintiffs; that is, the fish are delivered when needed and called for by plaintiffs. Fish which are not taken into the processing plants directly are left in the rail cars. To illustrate, if the fish are needed immediately by plaintiffs, they may not be "iced" at all (the weather is also a factor here), but brought

directly to plaintiffs' plants for processing and canning; if the fish are not needed for from four to six days, they may be "half-iced" (again the weather is a variable) and brought to plaintiffs' plants at the end of this period; if the fish are not needed for eight to twelve days, they may be "full-iced" (depending also on the weather), so that they will be preserved until needed for the actual canning operation at the end of this period.

f) When the rail cars carrying the fish arrive at plaintiffs' plants, pursuant to plaintiffs' instructions as aforesaid, they are parked on spur tracks on plaintiffs' property and unloaded by employees of plaintiffs. The rail cars generally arrive at night and are unloaded the following morning. After being removed from the rail cars, the fish are placed in movable carts or upon conveyors and are then transported to nearby public scales for weighing by a Certified Public Weighmaster. In some cases these scales are located on plaintiffs' property, while in others they are located on property adjacent to plaintiffs' plants.

g) After being weighed, the fish are immediately transported to "fish rooms" located inside plaintiffs' plants and deposited there to thaw along with other frozen fish purchased by plaintiffs from domestic sources. When the fish have thawed, they are then "gutted," otherwise prepared, and canned.

h) In accordance with Sections 8019, 8020, 8043, 8045, 8046 and 8047 of the Fish and Game Code, plaintiffs prepared and transmitted to the Department of Fish and Game monthly "Tax Reports" during the period involved in the within litigation. In these reports plaintiffs listed amounts, in pounds, of

frozen fish received at their plants. (This poundage is determined in the weighing process described in subparagraph (f) above.) These amounts so reported included fish received from domestic sources as well as the fish received from Japanese sources involved in the within litigation. Some of the fish purchased from Japanese sources were sold, as is, to others and thus were not received at and processed through plaintiffs' plants; this fish was not reported by plaintiffs and forms no part of the measure of the tax involved herein.

It is further stipulated that the depositions of Robert K. Pederson and Harold Delos Yaple may be received into evidence as if the witnesses personally testified at the trial, reserving to each party the right to object to said testimony on grounds other than the witness did not appear personally and testified.

It is further stipulated that if representatives of the other plaintiffs holding comparable positions were called as witnesses, they would testify substantially the same as Robert K. Pederson and Harold Delos Yaple with respect to the activities of their respective companies.

Without any concession as to the propriety of the plaintiffs' claims or right to interest, it is agreed that in the event the plaintiffs are successful in their contentions, the amount of poundage reported in the various causes of action in the complaints is correct and the amount of tax which the plaintiffs are seeking to recover, is correct.

Notwithstanding the foregoing stipulations, each party reserves the right to introduce such additional evidence as is relevant to the issues raised in the cases.

IV

STATEMENT OF FACTUAL ISSUES REMAINING TO BE TRIED

The parties believe that the foregoing Stipulation of Facts will contain most of the facts which are relevant for a decision on the legal question of the application of Section 8045 of the Fish and Game Code.

On the issue of the voluntariness, it is further stipulated that no representative of the Department of Fish and Game in any way or at any time ever threatened any of the plaintiffs with sanctions for failure to pay the tax, or ever threatened to invoke the penalty provision of the law or to seek criminal prosecution for failure on the part of the plaintiffs to pay such taxes for the years 1953 through 1958.

On the issue of estoppel it is further agreed that the following correspondence may be introduced into evidence without further foundation.

1. Letter from Real and Real to Department of Fish and Game, dated June 18, 1957;

2. Letter from James S. Libey, accounting officer, to Real and Real, dated June 21, 1957;

3. Letter from James S. Libey, accounting officer, to Real and Real, dated July 3, 1957;

4. Letter from Seth Gordon to Real and Real, dated August 23, 1957;

5. Letter from Real and Real to Seth Gordon, dated September 10, 1957;

6. Letter from the Department of Fish and Game to Real and Real, dated September 13, 1957;

7. Letter from Real and Real to the Department of Fish and Game, dated January 21, 1958;

8. Letter from Ralph W. Scott to Real and Real, dated April 1, 1958;

9. Letter from E. W. Deharak of Franco-Italian Packing Co. to the Department of Fish and Game, dated April 2, 1958;

10. Letter from Seth Gordon to Franco-Italian Packing Co., dated April 8, 1958;

11. Letter from Ralph W. Scott to Franco-Italian, dated April 22, 1958;

12. Letter from California Marine Curing Co. to the Department of Fish and Game dated January 9, 1958;

13. Letter from the Department of Fish and Game to California Marine Curing & Packing Co., dated January 14, 1958;

14. Letter from Herbert S. Lande to Ralph W. Scott, dated January 31, 1958;

15. Letter from Ralph W. Scott to Herbert S. Lande, dated Februray 3, 1958;

16. Letter from Ralph W. Scott to Herbert S. Lande, dated April 1, 1958;

17. Letter from A. E. Ekdale to the Department of Fish and Game, dated January 24, 1958;

18. Letter from Department of Fish and Game to A. E. Ekdale, dated January 28, 1958;

19. Letter from Ralph W. Scott to A. E. Ekdale, dated January 31, 1958;

20. Letter from A. E. Ekdale to Ralph W. Scott, dated February 3, 1958;

21. Letter from A. E. Ekdale to Department of Fish and Game, dated February 7, 1958; and

22. Letter from Ralph W. Scott to A. E. Ekdale, dated April 1, 1958.

DATED: DECEMBER 6, 1960.

STANLEY MOSK, Attorney General
DAN KAUFMANN, Assistant Attorney General
ROBERT M. SWEET, Deputy Attorney General

By DAN KAUFMANN
Assistant Attorney General
Attorneys for Defendant,
Department of Fish and Game

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Franco-Italian Packing Co. and
South Coast Fisheries, Inc.

EKDALE AND SHALLENBERGER
By ARCH E. EKDALE
Attorneys for Plaintiffs,
Van Camp Sea Food Co., Inc. and
Pan Pacific Fisheries, Inc.

HERBERT R. LANDE
Attorney for Plaintiff,
California Marine Curing and
Packing Co.

FILED
Long Beach
June 26, 1961

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. LB C 26970

STAR-KIST FOODS, INC., a California corporation, FRANCO-ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, PAN PACIFIC FISHERIES, INC., a California corporation and CALIFORNIA MARINE CURING AND PACKING CO., a California corporation,

Plaintiffs,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

No. LB C 26514

SOUTH COAST FISHERIES, INC., a California corporation,

Plaintiff,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

MEMORANDUM DECISION

The Court is of the opinion that for the following reasons, as contended by defendant, judgment must be ordered in favor of defendant:

(1) That Fish and Game Code Section 8045 is an excise tax upon the privilege of engaging in the local business of processing fish determined by the amount of fish consumed rather than a tax upon the fish.

(2) That the "original package" doctrine is not applicable because the fish were received to supply, and were essential to, the current operating needs of the plaintiffs under the rationale of the *Youngstown* and *U. S. Plywood* cases.

(3) That the fish, before the tax was imposed, were so acted upon as to lose their distinctive character as imports.

These conclusions make it unnecessary to consider defendant's further contentions regarding sovereign immunity, voluntary payment and the statute of limitations.

Judgment is ordered in favor of defendants in both cases, defendant to prepare Findings, Conclusions and Judgment, and to recover costs.

DATED: JUNE 26, 1961.

GEORGE FRANCIS
Judge of the Superior Court

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Attorneys for Defendant

FILED
Long Beach
July 13, 1961

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. LB C 26970

STAR-KIST FOODS, INC., a California corporation, FRANCO-ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, PAN PACIFIC FISHERIES, INC., a California corporation and CALIFORNIA MARINE CURING AND PACKING CO., a California corporation,

Plaintiffs,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

No. LB C 26514

SOUTH COAST FISHERIES, INC., a California corporation,

Plaintiff,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above consolidated cases having come on regularly for trial on the 30th day of January, 1961 in Department South "F" of the above entitled court, the Honorable George Francis, Judge Presiding, plaintiffs appearing by their attorneys, Real and Real, by M. L. Real, and the defendant appearing by its counsel, STANLEY MOSK, Attorney General of the State of California, DAN KAUFMANN, Assistant Attorney General and Robert M. SWEET, Deputy Attorney General and a written and oral stipulation as to the facts having been received in evidence and the depositions of Robert K. Pederson and Harold Delos Yaple having also been received in evidence, as if those persons had personally testified at the trial, and the matter argued orally and by written briefs, and the court being fully advised in the premises herewith makes the following

FINDINGS OF FACT

1. The court finds that the facts are as stated in paragraphs I and II and in paragraph III, subparagraphs a-h, inclusive, of the stipulation of facts on file herein, and to that extent the stipulation is hereby adopted as the findings of fact of the court with the additional facts hereinafter found to be true.

2. At all times involved in these actions the business of processing and canning fresh and frozen fish was carried on by the plaintiffs, and each of them, solely and exclusively at their respective plants located on Terminal Island in the City of Los Angeles, County of Los Angeles, State of California.

3. The taxes imposed by the defendant and involved in these actions were measured by the poundage

of fish actually consumed by the plaintiffs in their processing and canning operations at their respective plants on Terminal Island.

4. At the time the taxes involved in these cases were imposed, the fish, the poundage of which formed the measure of said taxes, had been received and committed to supply, and were essential to, the current operating needs of the plaintiffs in their respective California canning operations.

5. At the time the taxes involved in these cases were imposed, the fish, the poundage of which formed the measure of said taxes, had been handled and acted upon to the extent that they were no longer in the original form or condition in which they arrived at the Port of Los Angeles.

From the foregoing findings of fact the court makes the following

CONCLUSIONS OF LAW

1. The taxes involved in these consolidated cases were lawfully imposed and collected for the following reasons, and for each of them.

(a) Section 8045 of the California Fish and Game Code provides for an excise tax upon the privilege of engaging in the local business activity of processing and canning fish, the measure of which is determined by the poundage of fish consumed, rather than a tax upon the fish or their receipt.

(b) At the time the taxes involved herein were imposed, the fish, the poundage of which

formed the measure of said taxes, had been used for the purpose for which they were received and thus had become subject to state taxation.

(c) At the time the taxes involved herein were imposed, the fish, the poundage of which formed the measure of said taxes, had lost their distinctive character as imports and thus were subject to state taxation.

2. That for the foregoing reasons and for each of them the original package doctrine is not applicable in these cases and the taxes imposed by the defendant did not violate Article I, Section 10, Clause 2, the Import Export Clause, of the Federal Constitution.

3. That the foregoing conclusions made it unnecessary to consider defendant's further contentions regarding sovereign immunity, voluntary payment and the statute of limitations.

4. That the plaintiffs take nothing by reason of their complaints on file herein and that defendant shall have judgment for its costs.

Dated: This 13th day of July, 1961.

GEORGE FRANCIS
Judge of the Superior Court

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DAN KAUFMANN, Assistant Attorney General
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Los Angeles 12, California
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Attorneys for Defendant

FILED
Long Beach
July 13, 1961

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. LB C 26970

STAR-KIST FOODS, INC., a California corporation, FRANCO-ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, PAN PACIFIC FISHERIES, INC., a California corporation and CALIFORNIA MARINE CURING AND PACKING CO., a California corporation,

Plaintiffs,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

No. LB C 26514

SOUTH COAST FISHERIES, INC., a California corporation,

Plaintiff,

v.

DEPARTMENT OF FISH AND GAME,

Defendant.

JUDGMENT

The above consolidated cases having come on regularly for trial on the 30th day of January, 1961 in Department South "F" of the above entitled court, the Honorable George Francis, Judge Presiding, plaintiffs appearing by their attorneys, Real and Real, by M. L. Real, and the defendant appearing by its counsel, STANLEY MOSK, Attorney General of the State of California, DAN KAUFMANN, Assistant Attorney General and ROBERT M. SWEET, Deputy Attorney General, and a written and oral stipulation as to the facts having been received in evidence and the depositions of Robert K. Pederson and Harold Delos Yaple having also been received in evidence, as if those persons had personally testified at the trial, and the matter argued orally and by written briefs, and the court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been signed and filed, and good cause appearing therefor.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by virtue of their complaints on file herein, and that the defendant have judgment for costs in the sum of

$.....

The Clerk is ordered to enter this Judgment.

Dated: This 13th day of July, 1961.

GEORGE FRANCIS
Judge of the Superior Court

REAL and REAL
Attorneys at Law
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TErminal 3-2441 - SPruce 5-1723
Attorneys for Applicants

DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

DIST. COURT OF APPEAL—SECOND DIST.
FILED
JULY 9, 1963
J. T. ALLEY, *Clerk*
.....
Deputy Clerk

2nd Civil No. 26173
SUPERIOR COURT
Nos. LB C-26514 — LB C-26970
(Consolidated)

SOUTH COAST FISHERIES, INC.,
A California Corporation *Plaintiff and Appellant,*

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Respondent,

STAR-KIST FOODS, INC., A California Corporation, FRANCO ITALIAN PACKING CO., A California Corporation, VAN CAMP SEA FOOD CO., INC., A California Corporation, and MARINE CURING AND PACKING CO., A California Corporation,
Plaintiffs and Appellants,

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Respondent.

ORDER ENLARGING TIME FOR DOCKETING CASE IN THE SUPREME COURT OF THE UNITED STATES

The application to enlarg
above case in the Supreme
having been considered a
therefor:

IT IS ORDERED that
above case in the Supreme
be enlarged to and includi

DATED: July 9, 1963.

ASHBURN, Ac
of the District C
State of Califor

J. T. Alley, Clerk of the
Second Appellate District, S
by certify that the preced
copy of an order of this Cou
of my office.

Witness my hand and the
day of July, A. D., 1963.

J. T. ALLEY, Clerk
By J. Kavanagh, Deputy

3b—

e the time for docketing the
Court of the United States
nd good cause appearing

he time for docketing the
Court of the United States
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District Court of Appeal,
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rt, as shown by the records

seal of this Court this 9th

Clerk